Supreme Court, U.S.
FILED
MAR 11 2011
OFFICE OF THE CLERK

No. 10-720

IN THE
Supreme Court of the United States

DAVID C. GEISEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In his petition for certiorari, Mr. Geisen demonstrated why this Court should grant review to provide guidance on the doctrine of deliberate ignorance. In particular, Mr. Geisen showed how his case presents two discrete questions on which the lower courts are divided: (1) whether application of the doctrine should be limited to cases where any "ignorance" was motivated by the attempt to escape prosecution; and (2) whether the *per se* harmless error rule applied by the Court below is the proper standard when a court erroneously instructs a jury on deliberate ignorance.

Mr. Geisen's petition also established why this case presents an excellent vehicle for resolving these important questions. Indeed, as Mr. Geisen showed, the manner in which these issues are resolved *already has* made a difference on these facts: In the parallel administrative proceedings, in which the Nuclear Regulatory Commission refused to apply a deliberate ignorance rule, the same proof of willfulness and scienter was found insufficient under a civil preponderance-of-the-evidence standard. App. 65a-138a, and Petition for Writ of Certiorari (Pet.) 6-7. A jury determined otherwise only the district court here permitted the government to go forward on a deliberate ignorance theory.

The United States' brief in opposition acknowledges the legal disarray, and it at least tacitly acknowledges the importance of the questions raised by Mr. Geisen. Nonetheless, the United States urges the Court to deny review for a variety of reasons -- the supposedly complex nature of the facts, the supposition

that the lower courts can resolve the confusion on their own, and the assertion that Mr. Geisen cannot prevail on the merits even if the Court agrees with him on the law. Upon examination, each of the government's arguments is meritless.

1. At the outset, the United States tries to portray Mr. Geisen's case as complicated and fact-bound, and suggests that a thorough review of these intricate facts supposedly shows Mr. Geisen's level of actual knowledge of the falsity of his presentations and statements to the NRC to be "overwhelming." Brief for the United States in Opposition ("BIO") 27. But the important facts are simple and inconsistent with the government's rendition.

In the district court, David Geisen was charged with willfully and knowingly making false statements in violation of 18 U.S.C. § 1001, based on presentations and paperwork he presented to the NRC as part of his supervisorial responsibilities. Pet. 3. There was no doubt at trial that Mr. Geisen had done a poor job in confirming the accuracy of his statements to the NRC -- he admitted as much on the stand -- but there was simply no evidence as to why he would have lied intentionally to the NRC about inspections he didn't conduct. *See* Pet. 4. In other words, the critical issue at trial was actual knowledge. Deliberate ignorance was added by the government as a theory only at the last minute, when it became clear that its evidence of actual knowledge was minimal. It was a theory that made no sense on its own as the government never suggested any plausible reason Mr. Geisen would deliberately fail to prepare for NRC presentations, other than speculation about wanting to aid his employer's bottom line -- a motive so general and broad as to be

present in virtually every case. *See United States v. Goyal*, 629 F.3d 912, 919 (9th Cir. 2010) (rejecting notion that general financial incentives in line with those of company bottom line can suffice to establish motive to falsify). However, despite the implausibility of the deliberate ignorance theory on its face, its injection into the case created a great potential for confusion, as the trial evidence of Mr. Geisen's negligence as a manager was substantial, Pet. 4-5, and the widely-recognized danger of this instruction is to prompt jurors to convict under a negligence standard. Pet. 14-15.

Even so, jurors returned a divided verdict, acquitting on two counts and convicting on three others after considerable deliberations. Pet. 5. In reviewing post-verdict motions, and hearing all the evidence, the trial judge said this was a "close case" as to whether there was legally sufficient evidence of Mr. Geisen's knowledge and willfulness. App. 63a. And the NRC, the putative victim of the false statements, has gone further, hearing all of the evidence and determining that Mr. Geisen had no actual knowledge that his statements to it were false under a civil preponderance-of-the-evidence standard. App. 65a-138a; Pet. 6-7. Likewise, the Sixth Circuit, in rejecting Mr. Geisen's sufficiency of the evidence challenge, never suggested that there was "overwhelming" evidence of actual knowledge; it merely ruled that the evidence made it over the sufficiency bar. App. 1a-60a.

Nonetheless, the government's entreaty to deny certiorari rests largely on its claim that the evidence of actual knowledge was "overwhelming," BIO at 27, purportedly rendering Mr. Geisen's arguments about deliberate ignorance beside the point. The fact that

the government's central premise is contradicted by the trial judge, the appellate court and the NRC itself says all the Court needs to know about the weakness of the government's position.

2. As to the law, the government's arguments also fail. Indeed, even the United States cannot dispute that the deliberate ignorance doctrine is one of widespread application, which this Court has never addressed, and which commentators and courts have shown is in general disarray. Nor can the government meaningfully dispute the importance of this issue, given the breadth of the false statements law, the fact that thousands of mid-level managers like Mr. Geisen interact with government officials every day, and the Sixth Circuit's application of this doctrine to anyone who "deliberately cho[oses] not to prepare himself in preparing . . . submissions" to a government agency. Pet. 16. Instead, the government tries to poke holes in the extent of legal division presented by Mr. Geisen's petition. But in the end, both the motive issue and the harmless error issue raised in Mr. Geisen's petition reflect a general level of legal disagreement in an important area of the law -- an area this Court has not explored previously and is worthy of this Court's corrective intervention.

a. On the motive issue, the Government asserts that the Courts of Appeals "generally agree" about the absence of any need to prove a motive to escape prosecution as a predicate to giving a deliberate ignorance instruction. BIO 16. But the United States must nonetheless concede that at least three courts of appeal have examined the "propriety" of a deliberate ignorance instruction by determining whether the government has presented evidence that

"'the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of prosecution.'" BIO at 16-17 *quoting United States v. Delreal-Ordones*, 213 F.3d 1263, 1268 (10th Cir. 2000). The government goes on to argue that the three Courts of Appeals that have stated this rule have not seriously applied it, and thus any Circuit split supposedly vanishes. BIO 16-17. But this facially implausible argument cannot withstand scrutiny, as Judge Kleinfeld's concurring opinion in *United States v. Heredia*, 483 F.3d 913, 924-30 (9th Cir. 2007) (Kleinfeld, J. concurring) demonstrates.

Judge Kleinfeld's opinion in *Heredia* not only eloquently explains the necessity of a motive requirement in order to remain faithful to the statutory language -- "to allow conviction without positive knowledge or wilful avoidance of such knowledge is to erase the scienter requirement from the statute" -- but also highlights the extraordinary amount of contradiction and confusion among courts on this issue. *Id.* The fact of the matter is, the government's nitpicking aside, there remains a substantial level of disagreement among the lower courts about the very important issue of whether a motive to escape prosecution is a necessary predicate for the giving of a deliberate ignorance instruction.

Nor can be there be any real question about why this particular issue is so important. Read broadly, the deliberate ignorance doctrine presents real dangers about convictions based on negligence, particularly under circumstances like those presented in this case. *See, e.g.*, *United States v. Alston-Graves*, 435 F.3d 331, 340 (D.C. Cir. 2006) (noting danger that willful blindness instruction improperly permits conviction for

unexplored 'red flags').[1] As Judge Kleinfeld explained in his concurring opinion in *Heredia*, the motive requirement acts as a concrete check on this danger, limiting the scope of the deliberate ignorance doctrine to narrow, identifiable bounds in which the blindness is motivated by a desire to create a defense to prosecution. *Heredia*, 483 F.3d at 924-30. Without such a requirement, the government can rely on broad and generalized financial incentives as a supposed motivator to avoid knowledge, as it did here, even though any link between such a generalized motive and scienter is present in every case and is completely speculative. *United States v. Goyal*, 629 F.3d at 919.

Currently, the law is quite unsettled as to whether this important check on the doctrine of deliberate ignorance is required. Nothing in the government's brief shows otherwise. This Court should intervene.

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[1] "One problem with the various formulations of this instruction is that the jury might convict a defendant for acting recklessly - a problem the drafters of the Model Penal Code recognized - or even for acting negligently. Negligence and recklessness are not the same as intentional and knowing conduct. . . . Yet willful blindness instructions have been justified when '"record evidence reveals 'flags' of suspicion that, uninvestigated, suggest willful blindness."' *United States v. Epstein*, 426 F.3d 431, 440 (1st Cir. 2005) (quoting *United States v. Coviello*, 225 F.3d 54, 70 (1st Cir. 2000)); *see also United States v. Craig*, 178 F.3d 891, 898 (7th Cir. 1999) (affirming conviction based on willful blindness because defendant "saw and experienced enough suspicious activities to raise several red flags," which "supports an inference that she consciously chose not to pursue the truth")." *Alston-Graves*, 435 F.3d at 340.

b. On the harmless error issue, the Government admits there is a circuit split as to whether traditional harmless error review or *Mari's per se* harmless error rule applies under these circumstances. Indeed, the government's own discussion of this issue reveals numerous intra-circuit conflicts in which panels of the same Court of Appeals contradict one another in published and unpublished opinions. *See, e.g.*, BIO 24-25 (arguing that unpublished opinions of 8th and 10th circuits, applying a different standard than earlier published opinions, show absence of conflict). Nonetheless, the government asserts that more Court of Appeals are moving in its direction based on their supposedly better understanding of this Court's 20-year old decision in *Griffin v. United States*, 502 U.S. 46 (1991). According to the government, the lower courts will ultimately reach unanimity in its favor on this point. BIO 20-27. But the fact they have not, 20 years later, is evidence of the intractability and ripeness of the split, not evidence that it will go away on its own. It is this Court's decisions -- and specifically the ambiguity of line between the harmless error rules in *Griffin* and *Yates v. United States*, 354 U.S. 298 (1957) -- that are causing this disarray, *see* Pet. 20-22, and only this Court can definitively resolve it.

c. On the question of whether Mr. Geisen's case is suitable for certiorari, the government's main argument is that the evidence of actual knowledge is supposedly so overwhelming as to make any questions of deliberate ignorance beside the point. BIO 27. But, as noted, this argument is refuted by the district court's description of the sufficiency of actual knowledge evidence as "close", App. 63a, the jury's

divided verdict on similar counts, and the NRC's civil acquittal of Mr. Geisen under a preponderance of the evidence standard in which deliberate ignorance was rejected as a viable theory. App. 65a-138a.

As a fall back, the Government also disputes the suitability of this case for review because the Court of Appeals "properly" found that the evidence of deliberate ignorance sufficed to warrant a jury instruction. BIO 27. But that contention is correct only if the Court determines that the Sixth Circuit's legal standard, in which motive to escape prosecution was not considered, was the appropriate one. If it does not, this Court will be squarely faced with the Sixth Circuit's alternative reliance on the harmless *per se* rule of *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995). And there can be no doubt about the importance of the proper harmless error standard in this case. The trial below involved at most weak evidence of actual knowledge, but substantial evidence of managerial negligence. These are precisely the circumstances courts have identified where the deliberate ignorance instruction is the most harmful -- a weak case of actual knowledge, but a strong case of negligence. *Alston-Graves*, 435 F.3d at 340.

This is a case, in other words, in which this Court's determination of the proper standard will be dispositive, and the government's harmlessness analysis contends otherwise only by ignoring the most harmful part of the error. Indeed, it is difficult to conceive of a better vehicle for this Court's intervention than a case where a criminal jury convicted after receiving a deliberate ignorance instruction, but a civil administrative panel, reviewing the same facts, acquitted Mr. Geisen of willfully making false statements to

it after rejecting application of the deliberate ignorance doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2011